

## Hyderabad Precision Mfg. Co. Pvt. Ltd. Vs Government of India Ministry of Defence

**Court:** Andhra Pradesh High Court

**Date of Decision:** Sept. 13, 2013

**Citation:** (2013) 6 ALD 492 : (2013) 6 ALT 677

**Hon'ble Judges:** Kalyan Jyoti Sengupta, C.J

**Bench:** Single Bench

**Advocate:** K. Mamata Choudary, for the Appellant; B. Sudhakar Reddy, for the Respondent

**Final Decision:** Disposed Off

### Judgement

@JUDGMENTTAG-ORDER

Kalyan Jyoti Sengupta, C.J.

This application has been taken out by the applicant under the provisions of Section 11(2) and (6) of the

Arbitration and Conciliation Act, 1996, for appointment of an Arbitrator or an Arbitral Tribunal to adjudicate the claims and disputes between the

applicant and the respondents as this Hon"ble Court may deem fit. The undisputed facts which are relevant to this case are as follows. The parties

hereto have entered into an agreement in writing for supply of defence components to the respondents. While entering into an agreement, the

parties have agreed for the following mechanism, under clause 10, for resolution of the disputes between the parties. The said clause reads as

follows:

In the event of any dispute or difference relating to the interpretation and application of the provisions of the contracts, such dispute or difference

shall be referred by either party for Arbitration to the sole Arbitrator in the Department of Public Enterprises to be nominated by the Secretary to

the Government of India in-charge of the Department of Public Enterprises. The Arbitration and Conciliation Act, 1996 shall not be applicable to

arbitration under this clause. The award of the Arbitrator shall be binding upon the parties to the disputes provided, however, any party aggrieved

by such award may make a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry

or Law & Justice, Government of India. Upon such reference, the dispute shall be decided by the Law Secretary or the Special

Secretary/Additional Secretary, when so authorized by the Law Secretary, whose decision shall bind the parties finally and conclusively. The

parties to the dispute will share equally the cost of arbitration as intimated by the Arbitrator.

2. There have been disputes and differences between the parties. One Dr. Gita Rawat, Joint Secretary, Department of Public Enterprises

(Permanent Machinery of Arbitrators), Public Enterprises Bhawan, Block 14, Room No. 314/315, CGO Complex, Lodhi Road, New Delhi-110

033, was appointed, sole Arbitrator, to adjudicate the disputes between the parties. The learned Arbitrator, vide communication dt. 17.10.2011

while intimating the date of hearing of the case, directed the parties to file their pleadings. Paragraph 7 of the said communication reads as follows:

Parties may kindly note that this Forum has been established in terms of the decision of the Cabinet Secretariat in compliance of the directions of

the Hon"ble Apex Court in the case ONGC Vs. Collector of Central Excise, Mumbai. In PMA Arbitration and Conciliation Act, 1996 or any

other law for the time being in force, shall not be applicable. Arbitrator shall make speaking award and award will be published on plain paper.

Award of PMA shall be binding upon the parties. However, any aggrieved party may file an appeal against the award before the Law Secretary,

Department Legal Affairs, Ministry of Law & Justice for setting aside or revision of the Award. There shall be no appeal against the decision of the

Law Secretary. Parties are not allowed to go to the Court for setting aside the Award published by this Forum as the Arbitration and Conciliation

Act, 1996 is not applicable here. The decision of Law Secretary is binding upon the parties.

3. It appears that the applicant acting upon the said clause has written a letter dt. 22.11.2011 to Dr. Gita Rawat, sole Arbitrator, raising legal

issues as to applicability of the aforesaid clause.

4. The tenor of the letter suggests that the applicant wants to settle the disputes through arbitration mechanism. The aforesaid letter does not say

that there is no arbitration agreement, but the method and procedure as contained in the arbitration clause is disputed.

5. The stand taken by the respondents in the counter affidavit is that once having agreed to the terms of the contract, the applicant cannot go

beyond that.

6. On a reading of the arbitration clause, in my view, a portion of the mechanism stipulated in the arbitration clause is contrary to law. That is

providing for non-applicability of the Arbitration and Conciliation Act, 1996 is void, under the provisions of Section 23 of the Indian Contract Act.

Section 23 of the Contract Act, the portion of which is relevant to this case, is quoted hereunder:

23. What considerations and objects are lawful, and what not:-

The consideration or object of an agreement is lawful, unless-

It is forbidden by law, or

Is of such a nature that, if permitted, it would defeat the provisions of any law;

....

7. Now the question remains is whether the entire arbitration clause has to be declared void or any unjust portion, or not.

8. From the pleadings of the parties, it appears that both the parties have intention for arbitration. The arbitration mechanism provided under the

said agreement is not accepted.

9. Accordingly, instead of declaring the entire arbitration agreement being bad in law, I can sever the illegal portion, and such severance is

permissible, as has been held by Hon"ble Single Judge of the Supreme Court in the case of Shin Satellite Public Co. Ltd. Vs. Jain Studios Limited,

10. Paragraph 15 of the report of the said judgment reads as follows:

It is no doubt true that a Court of law will read the agreement as it is and cannot rewrite nor create a new one. It is also true that contract must be

read as a whole and it is not open to dissect it by taking out a part treating it to be contrary to law and by ordering enforcement of the rest if

otherwise it is not permissible. But it is well settled that if the contract is in several parts, some of which are legal and enforceable and some are

unenforceable, lawful parts can be enforced provided they are severable.

11. Following the aforesaid decision, the portion of the agreement providing for non-applicability of the Arbitration and Conciliation Act, 1996 is

hereby declared as illegal and invalid, and the remaining portion of the agreement is valid and existing and the same will be applicable to the

arbitration proceedings.

12. Now the question is who will be Arbitrator.

13. It appears that the applicant itself wrote a letter to Dr. Gita Rawat, sole Arbitrator, raising question of non-applicability of the arbitration

agreement. The learned Arbitrator should have decided the matter. However, the applicant did not appear, despite notice.

14. Under the circumstances, in view of my observations aforesaid, said Gita Rawat, will act as sole Arbitrator to adjudicate the disputes between

the parties. These arbitration proceedings will be governed by the provisions of the Arbitration and Conciliation Act, 1996.

15. I make it clear that Dr. Gita Rawat will be acting as Arbitrator in terms of the order of this Court and shall not act in terms of the agreement

which has been placed before the Court, and the other terms and conditions regarding passing of Award shall be followed.

16. It is stated that the prohibition challenging of Award before Court of law, may also be declared as illegal.

17. I clarify that the parties will be free to approach appropriate Court whenever any situation arises whether before or after passing of Award.

18. I, therefore, direct the learned Arbitrator to serve notice refixing the date for filing statement of claim and counter statement of claim. I also

direct the learned Arbitrator to make publication of Award after hearing all the parties, within a period of five months from the date of

communication of this order. The arbitration application is accordingly disposed of.